Judicial Settlement

of International Disputes

No. 9

The International Grand Jury

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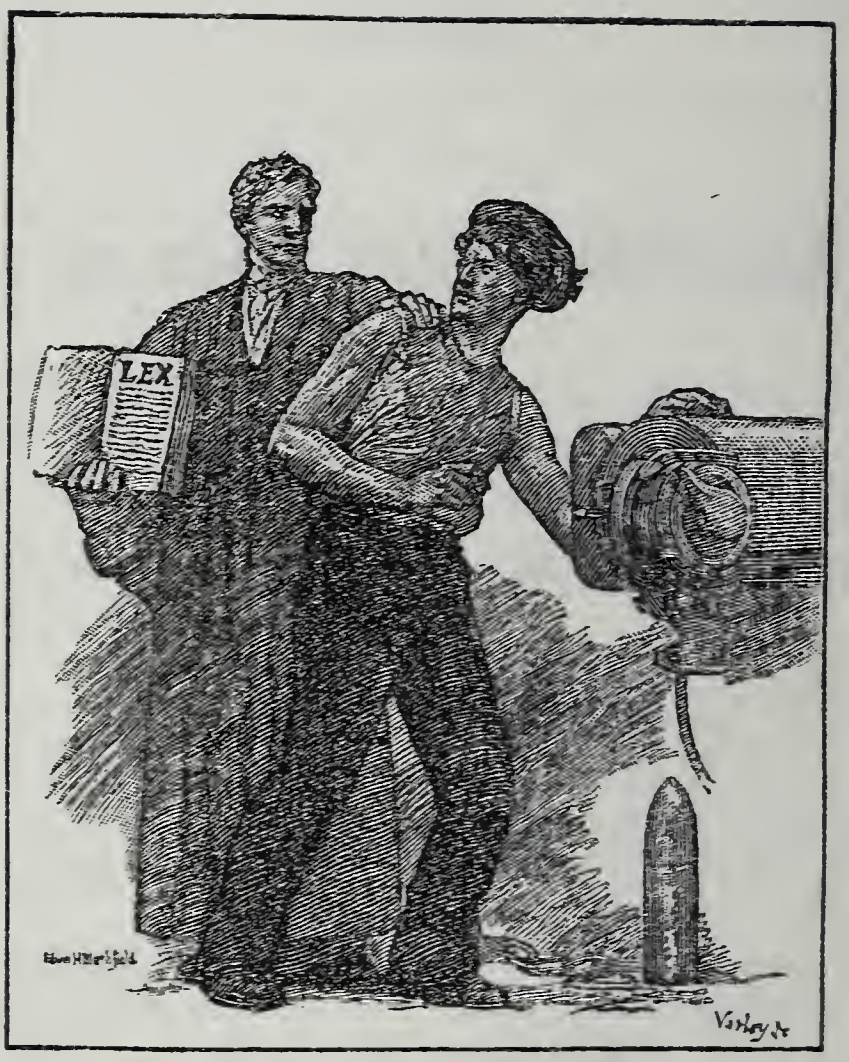
AUGUST, 1912

Published Quarterly by American Society for Judicial Settlement of International Disputes.

Baltimore, U. S. A.

Entered as second-class matter March 21, 1910, at the Postoffice at Baltimore, Md., under the Act of July 16, 1894.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The International Grand Jury

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One of the notable achievements of the First Hague Conference was the prominence given to international commissions of inquiry as one of the best means for the pacific settlement of international disputes. The proposal to establish them gave rise to one of the longest and most ardent debates of the Conference.

A large majority of the delegates shared the conviction that governments should investigate before they fight, and the belief that if they investigate before they fight in all proba-

bility they will *not* fight at all. They believed also that the *truth,* the whole truth, and nothing but the truth, relating to international disputes should be impartially ascertained and made public, and that during such investigation popular passions would have time to cool, and a peaceful settlement of the difficulty thus be made more easy.

On the other hand, a minority of the delegates argued that the establishment by the conference of international commissions of inquiry would be too long a step in the direction of obligatory arbitration; that a report by such commission, if it were adverse to the interests of a large power, would cause the large power to refuse to arbitrate the dispute; that such commissions would be a strong link in the chain which was being forged for the binding together of the nations in a union which would infringe upon the sovereignty of the smaller powers; and that at the bottom of

every request by one state for an international commission of inquiry there is a kind of doubt as to the impartiality of the investigation made by the national authorities of the other state, while the acceptance of a proposal to name such a commission implies a willingness to subject the action of its own authorities to a kind of international control.

So persistently were these arguments urged, (they were *fears*, rather than arguments, as Baron d'Estournelles declared, and therefore could not be answered), so determined were the delegates of three Balkan governments (Roumania, Servia, and Greece) to defeat the adoption of international commissions of inquiry in any form, that the conference was finally obliged, instead of *establishing* them and conferring upon them a wide scope of activity, merely to declare that it would be *useful* for the signatory powers to establish them, "in so far as circumstances permit," and in questions

"involving neither the honor nor the vital interests of the powers concerned."

This apparent failure of the conference to take what seemed to be so short and so reasonable a step towards international justice, was one of the reasons why it was made the laughing-stock of a reckless press and the object of contempt of thoughtless people. But seldom indeed has there been so striking an illustration of the importance of declaring the truth, however tritely, of holding up "a standard to which the wise and the honest may repair." Endorsed thus feebly by the conference, but made practicable by the adoption of a few simple rules of procedure, and impressed upon the attention of thinking men, international commissions of inquiry have found an assured place in international relations. Resorted to by Great Britain and Russia in the case of the fishermen of the Dogger Bank, it allayed the passions of the British people at a

grave period of the Russo-Japanese War, and probably prevented that war from becoming fatefully enlarged in its scope and results.

At the Second Hague Conference the attempt was renewed to *establish* international commissions of inquiry, to make it incumbent upon powers not party to an international dispute to suggest a resort to them by the disputant powers, and to add to their duty of impartial investigation and report the further duty of fixing the responsibility for the occurrence which gave rise to the dispute. These propositions again stirred up determined opposition, which was this time almost unanimous and all that was accomplished by the second Conference in regard to the commissions, besides an improvement in their mode of procedure, was the adoption of a declaration that their establishment by the powers, under the former restrictions, would be *desirable* as well as *useful.*

Here the history of international commissions of inquiry ended, in apparent ignominy. But last year the President of our Republic under God took up this stone which the builders rejected and sought to make it the headstone of the corner.

When the original treaties of arbitration, and the Senate's objection to them, are carefully examined, it is seen that the heart of the treaties and the core of the opposition to them lay less in the apparently universal scope of the arbitration proposed than in the method of determining the arbitrability of questions in dispute. This method is the appointment of an international commission of inquiry, or, rather, the transformation of the familiar international commission of inquiry into an international grand jury.

With the growing belief in the efficacy of arbitration for the settlement of international disputes, there has been a rapidly growing

desire to have *all* international disputes submitted to this peaceful mode of settlement; but the supreme difficulty, the crux of the entire movement, is to *get the parties into court.*

The contracting governments declare that they are "resolved that no future difference shall be a cause of hostilities between them or interrupt their good relations and friendship;" and the Senate asserts that it "is as earnestly and heartily in favor of peace and of the promotion of universal peace by arbitration as any body of men, official or unofficial, anywhere in the world, or as anyone concerned in the negotiation of arbitration treaties." The treaties propose the arbitration of all "justiciable" questions and the Senate responds with a hearty Amen. So emphatic is this response that the way-faring man naturally asks, Then where was the hitch? And the suspicious man is inclined to regard the Senate's response as emphatic rather than sincere, and to apply to

it the words of Ambassador Choate at the Second Hague Conference when he characterized Baron Marschall von Bieberstein as being, "on the one hand, an ardent admirer of obligatory arbitration in the abstract, but, on the other, when this idea is to be put into practice, he becomes its most formidable opponent. It is for him an image which he adores in the sky, but which loses all its charm on touching the ground; he regards it in his dreams as a celestial vision, but when it approaches him he turns towards the wall and will not look at it!"

But although the Senate's dream of universal arbitration is somewhat troubled by such nightmares as attacks upon the Monroe Doctrine, the influx of undesirable immigrants, and aggressions upon the territorial integrity of the States and the nation, the real lion in its path was the great question: *How* shall the justiciability of international disputes be determined? Or as the report of its committee

states it: "The most vital question in every proposed arbitration is whether the difference is arbitrable."

To answer this fundamental question, the original treaties proposed to institute a joint high commission of inquiry, charged with the duty, first, of impartially and conscientiously investigating and reporting upon any controversy referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts; and, second, of determining the justiciability or non-justiciability of cases in which the parties disagree as to whether or not they are subject to arbitration.

The name of *Joint High*, instead of The Hague Conference's name of *International*, Commission of Inquiry was given to the new agent, but the first duty assigned to it was that proposed at The Hague; while, through the second duty assigned to it, it had been transformed from a high commission and raised to

the dignity of a *grand jury*. Thus had been proposed the immensely important step of adapting to the administration of international justice that great agency which has served the Anglo-Saxon people for seven centuries as one of the chief bulwarks of individual liberty and one of the most efficient tools in the enforcement of law and order.

History repeats itself in a most instructive and most encouraging way. Looking back to the days of the Norman and Angevin kings, when the faint heart-throbs of trial by jury were beginning to make themselves felt within the body politic of England and the virus of trial by battle was being expelled from the current of national justice, we see gradually emerging above the baronial turbulence and social injustice of the times the jury of inquest and presentment, which became the mother of grand and petit jury alike. Originating as a body of impartial witnesses, summoned by

royal writ and sworn before the king's officers to declare all the facts in a given case, it was used by William the Conqueror for inquiring into the Laws of Good King Edward and for securing the information upon which Domesday Book was based. Henry II used it in connection with the Assize of Arms and the Saladin Tithe, and substituted it for the wager of battle, in civil cases, for determining title and possession. It was Henry II also, who, in his great struggle with the barons and the church, lifted it above its rôle of inquiry and report and vested it with the power of indictment in criminal cases (Constitutions of Clarendon, 1164, sixth chapter, and Assize of Clarendon, 1166, first section). Magna Charta (thirty-ninth section) made it the corner-stone of English jurisprudence; the American Colonies and States incorporated it in their temples of justice; and the United States Constitution (the fifth amendment) made it a foun-

dation stone of the new Republic. Sustained by both common and statute law, and by the affections of a self-governing and law-loving people, it has achieved among the English-speaking peoples on both sides of the Atlantic a long and glorious record of beneficent activity. Finally the President of our Republic proposed to those same peoples its establishment within the international temple of peace and justice at The Hague, and invited all other nations to share with us its benefits.

The municipal grand juries of today include within their functions, first, *inquisition* of office, or the investigation of matters committed to their inquiry, upon evidence laid before them; second, *indictment,* or accusation of crime or misdemeanor; and, third, *presentment,* properly so-called, or inquiry into an accusation of crime or misdemeanor, upon the jury's own motion and from its own knowledge and observation.

It has not yet been proposed to invest the international grand jury with the function of *presentment* proper; but with the growing sense of the solidarity of nations we may yet hope to see a properly constructed grand jury of the nations taking cognizance of and presenting such patent crimes as the annexation of one's neighbor's outlying territories. But this is for the future. For the present, it was proposed in the Hague Conference, as has been seen, that the international commission of inquiry should be vested with the duty of *inquisition of office;* and then our President proposed that it should be vested with the great and distinctive duty of *indictment.* It is at first difficult for us to think into our old familiar terms of municipal jurisprudence their international significance. But it is clear that Article III of President Taft's treaty which empowered the joint high commission to test by the principles of law or equity the justici-

able character of international differences, was tantamount to the prime object of indictment, namely, the getting of a case before a court, the bringing of two disputants before the bar of justice.

The Senate objected to this summary process because it was opposed to the Senate's constitutional duty of itself sharing in the decision as to justiciability and in the appointment of the joint high commission.

Now, there can surely be no objection to the Senate's participation in the appointment of the American members of the joint high commission, at least in the usual manner of ratification. It has always been an essential feature of the municipal grand jury that it shall be of a *representative character.* Chosen at first from the Hundred, it was regarded as representative enough to present, inquire and indict, but not to give fair and adequate expression to the voice of the county as to the guilt or innocence

of the accused. Accordingly, it was enlarged by including representatives of "the four bills" and the jury of another Hundred, also at times by coroners, knights and others of representative character. The principle of representative government as a whole was cherished and preserved chiefly in the jury, and Parliament itself arose in the form of a great, national representative jury. It is entirely fitting, therefore, that the international grand jury, at least in the initial stages of its growth, should be representative in the large sense of the nations concerned; and that the Senate should share with the Executive the responsibility of its appointment. Indeed, since the municipal grand juries are summoned by courts of sufficient criminal jurisdiction, the Supreme Court of the United States might well have claimed its share in the appointment of the international grand jury—especially since the jury was to perform an essentially judicial function.

But the Senate's claim to a share in this judicial function of the international grand jury cannot be thus readily granted. It does not appear to be well founded on constitutional interpretation, and it certainly is most repugnant to the ideals of justice and fair play cherished by the old world members of the family of nations. At the Second Hague Conference, for example, the Austrian and other delegations persistently and almost tauntingly inquired of our American delegations how the United States government could possibly enter into any world treaty of genuine obligatory arbitration if the United States Senate must exercise the right of approving, not only the general treaty itself, but also a special treaty determining the object, scope, etc., of the arbitration of every individual dispute. Although Great Britain and France have agreed that the Senate *shall* ratify the "compromis" (that is, the agreement for the arbitration of each

specific dispute), as well as the general treaty, it cannot be expected that all other nations will be thus complacent, or that they or any other nations would make a general treaty submitting all justiciable cases to arbitration and at the same time assigning to the United States Senate the right of deciding on the justiciability of each case as it arose. Evidently, if such *be* the constitutional limitation of our government in international affairs, it is greatly in need of revision. In some way, by constitutional interpretation or constitutional amendment, the United States government must have the shackles stricken from its limbs so that it may fulfil unhampered its duties towards the other members of the family of nations.

But in regard to the joint high commission's duty of determining the justiciability of specific disputes, it does *not* appear that the Senate is vested by the constitution with any right or

duty. This is clearly either an administrative or a judicial measure. If it is an administrative measure, it must be performed, not by the Senate, but by a commission acting under the Executive, even as tariff boards pass upon the dutiability of imports under a treaty of reciprocity. If it is a judicial function, it must *a fortiori* be performed, not by the Senate, but by a commission vested with judicial powers, in the appointment of which the Senate may concur, but in the performance of whose judicial duties neither the Senate nor the Executive may interfere. It is not to be tolerated, under the rules of fair play, that a government may act as the judge or the petit jury in its own case; and it is no more to be tolerated that a government shall act as its own grand jury, and insist on the control of inquest, indictment, or presentment, of only such cases as may suit its pleasure or convenience.

Of course the *ideal* international grand jury would be one, not only composed of "good and lawful men," whose interest in any particular case does not transcend that common interest which every good member of society feels in the enforcement of law and justice, and who would therefore pass upon it with faithful impartiality, but it would be one also fairly representative, not of the governments interested in the particular case at issue, but of the Family of Nations as a whole. The Senate's committee has criticised the proposed treaties on the ground that they "are not in the direction of an advance, but of a retreat from The Hague provisions, because they revive the idea of confirming membership in the commission, if insisted upon by either party, to nationals instead of to wholly disinterested outsiders." While this criticism is entirely just from the point of view of the ideal, it does not come with peculiar propriety from a branch of the

legislative department of the government which demands for itself the right of withholding from arbitral adjudication cases in which it is vitally interested, especially since, immediately after this criticism of the treaties, it strenuously objects to vesting in an outside commission the power to decide on the justiciability of disputes. From the one point of view of the practical, it should be remembered that municipal grand juries were summoned at first only to inquire for the body of the county, *pro corpore comitatus*, and that as late as 1548 (2 and 3 Edw. VI, c. 24), it was the rule that when a man was wounded in one county and died in another, the offender was at common law indictable in neither county because a complete act of felony had been committed in neither. It is evident from past history and present human nature alike that rapid progress cannot be hoped for in the development of the newly-born grand jury of the

nations; it is evident also, from the Senate's vigorous opposition to the alleged radical character of the President's proposal, that this proposal marks a very great step towards the ideal.

The ideal international grand jury, also, would act for each member of the family of nations, large or small, just as surely and potently as it would for any of the others. The Senate committee's warning that "if we enter into these treaties with Great Britain and France we must make like treaties in precisely the same terms with any other friendly power which calls upon us to do so," is a reflection of the ideal and of the Senate's attitude towards it; while the President's frank acceptance of the alternative, his refusal to be terrified by the fear of the subjunctive, and his loyalty to justice regardless of the side on which the weight of her scales may turn, is a splendid object lesson to the nations, and

another great step towards the ideal which declares that just as public wrongs are considered in every civilized nation to be committed, not primarily against the individual, but against the commonwealth, so international wrongs must be considered as committed, not primarily against the individual nation, but against the family of nations, to whom international rights and duties preëminently pertain. In practice, again, it should be remembered that for generations after the introduction of indictment by means of the national grand jury, the accused, if sufficiently powerful, would refuse to put himself on the county, that is, to submit to jury trial, and that from 1275 to 1772 A. D. it was held necessary to punish such refusal by imprisonment and by the *peine forte et dure*. We cannot anticipate that the "great powers," led on as at present by the will-o'-the-wisp of territorial aggrandizement, will submit immediately to

be haled into court and to make retribution for their high crimes and misdemeanors.

But we may be profoundly thankful that our President has thus lifted from the dust the standard of international justice; and we may be assured that as the nations rally one by one to that standard, an international public opinion will be created, so enlightened, so just and so invincible, that no international delinquent, however great or obstinate, will refuse to bow to that sovereign power of our times and to the indictment of the ideal international grand jury which will represent it!

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